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4 MARKUP OF:
5 H.R. 5233, THE TRADE SECRETS PROTECTION ACT OF 2014
6 Wednesday, September 17, 2014
7 House of Representatives
8 Committee on the Judiciary
9 Washington, D.C.

10 The committee met, pursuant to call, at 1:11 p.m., in
11 Room 2141, Rayburn Office Building, Hon. Bob Goodlatte
12 [chairman of the committee] presiding.

13 Present: Representatives Goodlatte, Sensenbrenner,
14 Coble, Smith of Texas, Chabot, Bachus, Issa, King, Franks,
15 Gohmert, Jordan, Poe, Chaffetz, Marino, Gowdy, Labrador,
16 Farenthold, Holding, Collins, DeSantis, Smith of Missouri,
17 Conyers, Nadler, Scott, Lofgren, Johnson, Pierluisi, Chu,

18 DelBene, Garcia, Jeffries, and Cicilline.

19 Staff present: Shelly Husband, Majority Staff Director;
20 Branden Ritchie, Deputy Staff Director/Chief Counsel; Allison
21 Halataei, Majority Parliamentarian; Vishal Amin, Majority
22 Counsel; Kelsey Deterding, Majority Clerk; Perry Apfelbaum,
23 Minority Staff Director; Jason Everett, Minority Counsel;
24 Danielle Brown, Minority Parliamentarian; and Maggie Lopatin,
25 Minority Clerk.

26

27 Chairman Goodlatte. The Judiciary Committee will come
28 to order, and without objection, the chair is authorized to
29 declare a recess at any time.

30 Pursuant to notice, I now call up H.R. 5233 for purposes
31 of markup, and move that the committee report the bill
32 favorably to the House. The clerk will report the bill.

33 Ms. Deterding. H.R. 5233, to amend Chapter 90 of Title
34 18, United States Code, to provide Federal jurisdiction for
35 the theft of trade secrets and for other purposes.

36 Chairman Goodlatte. Without objection, the bill is
37 considered as read and open for amendment at any point.

38 [The information follows:]

39

40 Chairman Goodlatte. And I will begin by recognizing
41 myself for an opening statement. Today we are here to mark
42 up H.R. 5233, the Trade Secrets Protection Act. The bill
43 puts forward modest enhancements to our Federal trade secrets
44 law creating a Federal civil remedy for trade secret
45 misappropriation that will help American companies to protect
46 their intellectual property from criminal theft by foreign
47 agents and those engaging in economic espionage. This bill
48 will help U.S. competitiveness, job creation, and our
49 economy.

50 Trade secrets occupy a unique place in the IP portfolios
51 of our most innovative companies. They can include
52 confidential formulas, manufacturing techniques, and even
53 customer lists. But because they are unregistered and not
54 formally reviewed like patents, there are no limitations on
55 discovering a trade secret by fair, lawful methods, such as
56 reverse engineering or independent development. In
57 innovative industries, that is simply the free market at
58 work.

59 Though trade secrets are not formally reviewed, they are
60 protected from misappropriation, which includes obtaining the
61 trade secret through improper or unlawful means, and

62 misappropriation can take many forms, whether it is an
63 employee selling blueprints to a competitor or a foreign
64 agent hacking into a server. Though most States base their
65 trade secret laws on the Uniform Trade Secrets Act, the
66 Federal government protects trade secrets through the
67 Economic Espionage Act.

68 In the 112th Congress, this committee helped enact two
69 pieces of legislation to improve the protection of trade
70 secrets. Today in this committee, we are taking a positive
71 step toward improving our trade secrets law and building on
72 our work in this area of intellectual property.

73 I now recognize the ranking member of the Intellectual
74 Property Subcommittee, the gentleman from New York, Mr.
75 Nadler, for his opening statement.

76 Mr. Nadler. Thank you, Mr. Chairman. Thank you for
77 holding this markup of H.R. 5233, the Trade Secrets
78 Protection Act of 2014, which would amend the Economic
79 Espionage Act of 1996 to create a Federal civil remedy for
80 trade secret misappropriation. I am proud to be the lead
81 Democratic co-sponsor of this legislation, and I support the
82 Holding amendment, which makes important improvements to the
83 bill.

84 Trade secrets, proprietary business information that
85 derive its value from being and remaining secret, make up
86 approximately two-thirds of the value of U.S. companies'
87 information portfolios. American businesses own an estimated
88 \$5 trillion of trade secrets with roughly \$300 billion of
89 that stolen every year. This bipartisan bill will ensure
90 that our trade secrets law more robustly protects America's
91 innovators and businesses. We already protect trademarks,
92 copyrights, and patents through Federal and civil remedies.
93 It is time to do the same for trade secrets.

94 In light of their value and vulnerability, it is
95 critical that our laws provide robust protection for trade
96 secrets. Lacking a Federal course of action, companies
97 currently use State laws to protect trade secrets. While
98 this system appears to have worked relatively well for local
99 and intra-state disputes, it has not proven efficient or
100 effective for incidents across State and sometimes
101 international borders.

102 The amendment offered by Congressman Holding would
103 clarify that a seizure order cannot issue unless the subject
104 of the order is the misappropriator who used improper means
105 to acquire the trade secret or conspired with someone who

106 did. The Holding amendment also requires a study and report
107 related to trade secret theft that occurs outside the United
108 States, and requires recommendations of legislative and
109 executive actions to address such theft.

110 I urge support for the Holding amendment and the
111 underlying bill. This is critical for American
112 competitiveness and for American companies. We should have a
113 Federal remedy. Everybody seemed to agree with that at the
114 hearing. And I thank you, and I yield back the balance of my
115 time.

116 Chairman Goodlatte. The chair thanks the gentleman, and
117 would now like to recognize the sponsor of the legislation,
118 the gentleman from North Carolina, Mr. Holding, for his
119 opening statement.

120 Mr. Holding. Thank you, Mr. Chairman. I have a full
121 opening statement that I will submit for the record.

122 [The information follows:]

123

124 Mr. Holding. But in brief I want to thank you for
125 putting the Trade Secrets Protection Act on the agenda today.
126 I appreciate your guidance and leadership on this issue. I
127 also want to thank Mr. Nadler for working in a very
128 bipartisan manner with me, and thank the other co-sponsors of
129 the legislation.

130 Trade secrets are an increasingly important form of
131 intellectual property as we know. As the value and
132 importance of trade secrets increase, so does the interest in
133 stealing them. The committee heard testimony in June that
134 when trade secrets first began receiving protection, it was
135 under State law because their value was typically limited to
136 the State. In today's global economy, a trade secret may be
137 the sauce for our famous North Carolina barbecue, or a data
138 analytics algorithm, both of which are used by companies all
139 over the world.

140 Our global economy with globalized supply chains and
141 constant connectivity, has also made trade secrets more
142 vulnerable to theft. And as trade secret theft becomes more
143 sophisticated, our laws need to keep pace. And this
144 legislation will provide a more efficient, effective means
145 for trade secret owners to protect their property.

146 Mr. Chairman, at your direction, we spent countless
147 hours working to find consensus language with companies and
148 groups that raised concerns about our original proposal. And
149 today, I am happy to submit for the record letters of support
150 from companies and associations which represent a wide, wide
151 array of industries. I could list on and on the number of
152 companies and associations that have joined us in this effort
153 and like the product that we have produced, and I will have
154 them for the record.

155 So again I thank my colleagues for their hard work and
156 collaboration in this effort. Thank you. Yield back.

157 [The information follows:]

158

159 Chairman Goodlatte. The chair thanks the gentleman.
160 The chair's understanding is we have two amendments, one by
161 the gentleman from North Carolina, and I believe one by the
162 gentlewoman from California. We will not be able to get
163 through all of that before we have to go vote in a few
164 minutes, but we can start that process. So at this time, I
165 would ask if the gentleman from North Carolina would offer
166 his amendment.

167 Mr. Holding. Thank you, Mr. Chairman. I have an
168 amendment at the desk.

169 Chairman Goodlatte. The clerk will report the
170 amendment.

171 Ms. Deterding. Amendment to H.R. 5233, offered by Mr.
172 Holding of North Carolina, page 3, strike line 23 and all
173 that follows through page 4, line 3, and insert the
174 following --

175 Chairman Goodlatte. Without objection, the amendment is
176 considered as read.

177 [The amendment of Mr. Holding follows:]

178

179 Chairman Goodlatte. And the gentleman is recognized to
180 explain his amendment.

181 Mr. Holding. Thank you, Mr. Chairman. My amendment
182 makes three changes to the underlying text. The first two
183 changes relate to additional protections for website
184 operators. First, the manager's amendment amends the seizure
185 provision to make explicit that a seizure order cannot issue
186 unless the subject of the order is the misappropriator who
187 used improper means to acquire the trade secret or conspired
188 with one who did. This provision is intended to ensure that,
189 for instance, a website operator that publishes a
190 misappropriated trade secret cannot be subject of a seizure
191 order even if the operator knew the trade secret was stolen.

192 Second, Mr. Chairman, my amendment provides that nothing
193 in this act limits the exemption from liability that website
194 operators have for content published by third parties. Laws
195 pertaining to intellectual property are exceptions to the
196 liability exemption, and this amendment preserves that status
197 quo.

198 The purpose of this language is to ensure that nothing
199 in H.R. 5233 affects other Federal laws, in particular what
200 is referred to as Section 230 of the Communications Decency

201 Act. CDA 230 generally exempts websites from liability
202 stemming from content created by others. For example, a
203 website that allows comments to articles would not be liable
204 for a defamatory statement made by a commenter.

205 CDA 230 has several exceptions, including one for
206 intellectual property. CDA 230(e)(2) says, "Nothing in this
207 section shall be construed to limit or expand any law
208 pertaining to intellectual property." So, for example, CDA
209 230 would not exempt from liability websites which host
210 unauthorized copies of copyrighted work. The CDA language is
211 meant to clarify that and maintain the status quo.

212 This is the third change. Third, to address an issue
213 that has been raised during the process about trade secret
214 theft that occurs overseas, my amendment requires a study and
215 report related to trade secret theft that occurs outside the
216 United States, and requires the report to include any
217 recommendations on legislative and executive actions that may
218 address such theft. So I urge the committee to adopt my
219 amendment and vote the report favorably to legislation.

220 Chairman Goodlatte. The chair thanks the gentleman, and
221 the committee will stand in recess and return to vote on that
222 amendment and consider the amendment by the gentlewoman from

223 California and any other amendments that are offered
224 immediately after this series of votes. And since we do not
225 at this point have a reporting quorum, I would urge all the
226 members to urge their colleagues to come back because I think
227 it will be relatively expeditious once we do return.

228 And the committee will stand in recess.

229 [Recess.]

230 Chairman Goodlatte. The committee will reconvene. When
231 the committee recessed, we were considering an amendment to
232 H.R. 5233 offered by the gentleman from North Carolina, Mr.
233 Holding, who explained his amendment.

234 I will recognize myself for five minutes. I support the
235 gentleman's amendment. It improves the Trade Secrets
236 Protection Act, provides additional protection for Web site
237 operators, and appropriately highlights the issues relating
238 to foreign trade secret theft. I strongly support the
239 amendment and the passage of this bill.

240 For what purpose does the gentlewoman from California
241 seek recognition?

242 Ms. Lofgren. To strike the last word.

243 Chairman Goodlatte. The gentlewoman is recognized for
244 five minutes.

245 Ms. Lofgren. First, Mr. Chairman, I would like to ask
246 unanimous consent to place into the record two articles --
247 actually an article and a letter. An article by Eric
248 Goldman, who is an intellectual property lawyer in charge of
249 the High Tech Law Center at the University of Santa Clara,
250 entitled "Congress Is Considering a New Federal Trade Secret
251 Law - Why?" As well as a letter signed by 26 law professors
252 regarding the bill.

253 Chairman Goodlatte. Without objection, they will be
254 made a part of the record.

255 [The information follows:]

256

257 Ms. Lofgren. Thank you, Mr. Chairman. I would just
258 like to note I do have concerns and will be offering shortly
259 an amendment relative to the ex parte provisions of this
260 bill, but I would like to commend the gentleman for making
261 clear that the seizure provisions, even though I object to
262 them, do not touch into the SOFA realm that we were so
263 concerned about a few years ago.

264 Even though I continue to have concerns, I do want to
265 express my appreciation to him for that careful addition to
266 the bill.

267 I would like to ask a question, and I do not have an
268 amendment at this point, but perhaps we could continue
269 discussion. I agree that theft of trade secrets is a very
270 important issue. In Silicon Valley, I would guess that the
271 value of trade secrets may well exceed the value of patents
272 and copyrights, if you just wanted to add it all up. We
273 cannot know for sure because they are secret.

274 Theft is a huge problem. I would say theft from foreign
275 actors is a very huge problem. Now, I note there is a study,
276 and I think a study is good, but I would like to work with
277 the gentleman on directing the study to give additional
278 attention to potential remedies when the bad actors are

279 overseas.

280 I realize there are trade issues, but many of these
281 theft issues relate to really criminal activity and an
282 inability on the part of victims and even the United States
283 to adequately find remedies for these tremendously damaging
284 thefts.

285 I will vote for the amendment because I think it does
286 improve the bill, but as I said, I continue to have concerns
287 about the ex parte provision in its entirety.

288 I am wondering if the gentleman, if he could yield, if
289 we could have further discussions on additional remedies.

290 Mr. Holding. I think the gentlelady is correct in
291 acknowledging the problem. I believe it is an issue that we
292 can have continuing discussion with, and I look forward to
293 the study and looking at the results of the study, and
294 perhaps that being a basis of our conversation.

295 Ms. Lofgren. Very good, and with that, Mr. Chairman --
296 Chairman Goodlatte. If the gentlewoman would yield
297 further.

298 Ms. Lofgren. I am happy to yield further.

299 Chairman Goodlatte. As the gentlewoman might suspect,
300 this bill will not reach the floor of the House this week,

301 and therefore may not come up on the floor until after
302 November. So, there will be a great deal of time to work on
303 further considerations of the bill before it goes to the
304 floor. The committee and myself would also be happy to work
305 with the gentlewoman.

306 Ms. Lofgren. Thank you, Mr. Chairman, and with that, I
307 would be happy to yield back my time.

308 Chairman Goodlatte. For what purpose does the gentleman
309 from Pennsylvania seek recognition?

310 Mr. Marino. Strike the last word.

311 Chairman Goodlatte. The gentleman is recognized for
312 five minutes.

313 Mr. Marino. Chairman, I would like to commend my
314 colleague, Representative Holding, for introducing H.R. 5233.
315 This is a good bill and it takes a much needed step in the
316 right direction to protect our companies from trade secret
317 theft, which is why I have co-sponsored it.

318 However, I would be remiss in my role on the House
319 Foreign Affairs Committee if I did not say I would also like
320 to see this bill address some of the worse offenders, namely
321 those involved in international trade secret theft.

322 It is my hope there will be a chance to address this

323 bill before the bill should move to the Floor, and with that,
324 I yield back.

325 Chairman Goodlatte. The chair thanks the gentleman.
326 For what purpose does the gentleman from New York seek
327 recognition?

328 Mr. Jeffries. Mr. Chairman, I move to strike the last
329 word.

330 Chairman Goodlatte. The gentleman is recognized for
331 five minutes.

332 Mr. Jeffries. Thank you, Mr. Chairman. American
333 intellectual property is of vital importance to the future of
334 our economy as well as the future of our country. Trade
335 secrets, we know, are an unique type of intellectual
336 property, unlike patents and copyrights.

337 Once a trade secret is disclosed, its protection is gone
338 forever. A trade secret can be a scientific method, a
339 formula, a plan, a code, or other type of confidential
340 business information.

341 It is estimated that approximately \$300 billion is the
342 amount stolen in trade secret theft each year. This is
343 obviously unacceptable.

344 Overall, U.S. businesses own an approximate amount of \$5

345 trillion in trade secrets, which are currently only protected
346 through a patchwork of state civil laws and Federal criminal
347 laws. On the criminal side, over the last five years, the
348 amount of economic espionage and trade secret theft cases
349 overseen by the FBI has increased by more than 60 percent.
350 Trade secret theft is clearly on the rise.

351 At one time, civil laws at the state level may have
352 provided sufficient protections to trade secret owners, but
353 today, these civil laws have become inadequate.

354 First, state laws, of course, are not uniform. Second,
355 state court procedures lack uniformity, and the absence of
356 consistency creates delay when owners seek a swift court
357 order to prevent a trade secret stolen from being
358 disseminated. Third, given today's global technological era,
359 the way trade secrets are misappropriated has substantially
360 changed.

361 It is less likely that misappropriation today occurs
362 through the theft of hard copy documents. Instead, it is
363 much more likely that hundreds of files are downloaded onto a
364 flash drive in mere minutes or disseminated around the world
365 via e-mail in a matter of seconds.

366 Trade secret owners need uniform procedures to provide

367 fast and efficient protections for their valuable
368 information. This legislation provides exactly that, a
369 carefully crafted Federal civil cause of action for owners to
370 protect their trade secrets.

371 All other forms of intellectual property have a Federal
372 civil cause of action. The magnitude of trade secrets is
373 evidence in itself that we should also provide this means of
374 protection to trade secret owners.

375 I would like to ask unanimous consent to introduce into
376 the record an article that has been written by Mr. Holding,
377 Mr. Nadler, Mr. Chabot, Mr. Conyers, Mr. Coble, and myself in
378 Business Insider entitled "Why Protecting Our Trade Secrets
379 is Essential to Saving the Economy."

380 Chairman Goodlatte. Without objection, it will be made
381 a part of the record.

382 [The information follows:]

383

384 Mr. Jeffries. Thank you. In closing, I just want to
385 thank Representative Holding for his leadership as well as
386 Representative Nadler and the other original co-sponsors of
387 this legislation, along with the chairman, and I urge my
388 colleagues to support the amendment, as well as the
389 underlying bill, and I yield back.

390 Chairman Goodlatte. The chair thanks the gentleman.
391 The question occurs on the amendment offered by the gentleman
392 from North Carolina.

393 All those in favor respond by saying aye.

394 Those opposed, no.

395 In the opinion of the chair the ayes have it and the
396 amendment is agreed to.

397 Are there further amendments to H.R. 5233?

398 Ms. Lofgren. Mr. Chairman?

399 Chairman Goodlatte. For what purpose does the
400 gentlewoman from California seek recognition?

401 Ms. Lofgren. I have an amendment at the desk.

402 Chairman Goodlatte. The clerk will report the
403 amendment.

404 Ms. Deterding. An amendment to H.R. 5233 offered by Ms.
405 Lofgren of California. "Page two, strike line 13 and all

406 that follows through page seven --

407 Chairman Goodlatte. Without objection, the amendment
408 will be considered as read.

409 [The amendment of Ms. Lofgren follows:]

410

411 Chairman Goodlatte. And the gentlewoman is recognized
412 on her amendment.

413 Ms. Lofgren. Thank you, Mr. Chairman. This amendment
414 would remove the provisions that provide for ex parte
415 seizure. Currently, the Uniform Trade Secrets Act does not
416 provide for ex parte seizure of property, and it is worth
417 noting that the UTSA has been enacted by 47 states and the
418 District of Columbia, and not a single one of those entities,
419 not the 47 states or D.C., have included an ex parte seizure
420 provision.

421 Now, when the UTSA was originally drafted in 1979 and
422 since then, there have been numerous opportunities to add
423 such a remedy. In fact, just last year Texas became the 47th
424 state to enact UTSA, and again, without creating an ex parte
425 seizure remedy.

426 In fact, the remedy that states do supply for the
427 situation that ex parte seizure is attempting to address is
428 the same remedy that is already available in Federal court,
429 which are ex parte temporary restraining orders.

430 It is true that both the trademark and copyright laws
431 provide for ex parte seizures, but they both also have
432 registration requirements that at least make ascertaining

433 whether something is counterfeit or an unlawful copy ex parte
434 more feasible.

435 Although I would also point out that these two are far
436 from infallible, as we saw with the inappropriate domain name
437 seizures of Da Jazz 1 and Rojdirecta a few years ago prior
438 to the SOFA debate, a key element of trade secret is that it
439 be a secret, something not generally known to the public or
440 competitors, and not easily ascertainable or reverse
441 engineered.

442 So, I have concerns that this is not something that can
443 be fairly determined with only one party providing the
444 evidence, and this difficulty is only increased by the fact
445 that a trade secret can cover such a large breadth of
446 information, from information that is patentable or
447 copyrightable, information that is otherwise not protected by
448 other intellectual property laws.

449 I do not think it is reasonable to expect a judge to be
450 able to determine whether a software or hardware trade secret
451 is something known by the competition or readily
452 ascertainable or capable of being reverse engineered with
453 only evidence from one side.

454 My amendment would bring the Trade Secrets Protection

455 Act more in line with the UTSA by removing the ex parte
456 seizures.

457 I do not think now is a good time to rush through what
458 will be the biggest change to trade secret law in modern
459 history.

460 Now, I find it ironic in a sense that the argument
461 against preempting state law with this bill is that the
462 states have spent the last 150 plus years honing trade secret
463 law into fair and efficient law, but when it comes to the ex
464 parte seizure provisions, the bill ignores their wisdom by
465 creating a remedy that so far every state has declined to
466 provide.

467 I do not think now is the right time to start moving
468 towards Federal trade secret law, at least I have some
469 concerns. However, even if we do that, including such a huge
470 deviation from current law without a more in depth discussion
471 would be a big mistake.

472 I have had an amendment which I am not going to offer
473 relative to preemption of state law, and I decided not to
474 offer it because of the tremendous value that is attached to
475 California state law when it comes to trade secrets, both by
476 the business community and generally.

477 I will say I have had a lot of feedback quite recently
478 of concern that California's law that has served the business
479 community very well will be tremendously undercut by a
480 Federal provision, especially a Federal provision with an ex
481 parte seizure provision.

482 Concern has also been expressed to me by start-up's who
483 fear that it will be used by large companies to attack start-
484 up's whenever an engineer leaves a large company, and in
485 California, the do not compete provisions that are found in
486 some other states are unenforceable.

487 So, in short, I do think, although I am not sure we are
488 ready for a Federal remedy at this moment, I would like more
489 study on it. At least we ought not deviate so strongly from
490 what the states have done and what the Uniform Trade Secrets
491 Act has provided since 1979, and that is why I offered this
492 amendment to remove the ex parte seizure provision.

493 I thank the Chairman for recognizing me and yield back
494 the balance of my time.

495 Chairman Goodlatte. The chair recognizes himself in
496 opposition to the amendment. I thank the gentlewoman for her
497 comments, but I must oppose the amendment because it removes
498 a very important component of the legislation.

499 If a company knows that its trade secret has just been
500 stolen, it often has only a matter of hours or days before
501 that secret will be sold to a competitor either in the United
502 States or abroad, and the ability to act quickly is
503 imperative.

504 Trade secrets, unlike other forms of IP, have their
505 value in being secret. Once it is sold or distributed, the
506 know-how is no longer a competitive advantage. In most
507 cases, particularly when there is a dispute between
508 legitimate companies, an immediate injunction from the court
509 not to disseminate the trade secret or destroy the evidence
510 will suffice.

511 Where a thief sneaks into a facility, steals a trade
512 secret and is heading to the airport to fly to China and sell
513 it, a piece of paper from the court is not going to stop that
514 person.

515 That is why the seizure provision is necessary. It is
516 also why a seizure is not permitted unless the plaintiff can
517 demonstrate that among other things, the party who stole the
518 trade secret would evade a court order.

519 When the committee held a hearing on trade secret issues
520 in June, all of the witnesses agreed that a seizure provision

521 was necessary but had to be carefully crafted. We heard
522 those concerns and have worked to make sure the language in
523 the legislation is narrowly tailored to prevent misuse of the
524 provision or any harm to third parties.

525 The bill not only includes numerous safeguards to
526 prevent a seizure order from issuing in all but the most
527 extreme cases, it also includes a significant punishment for
528 an applicant who obtains an excessive or unwarranted seizure.

529 So, if a larger company improperly goes after a small
530 business or start-up, they have a remedy that includes
531 punitive damages for any harm done to it. It is also why a
532 seizure is not permitted unless the plaintiff can demonstrate
533 that among other things, the party who stole the trade secret
534 would evade a court order.

535 Further, the plaintiff must demonstrate that the order
536 would be issued to seize property from the thief, not from a
537 third party.

538 For these reasons and others, I must oppose the
539 amendment.

540 For what purpose does the gentleman from North Carolina
541 seek recognition?

542 Mr. Holding. Move to strike the last word.

543 Chairman Goodlatte. The gentleman is recognized for
544 five minutes.

545 Mr. Holding. At this time, Mr. Chairman, I would like
546 to introduce into the record and ask unanimous consent to
547 enter into the record letters of support from the National
548 Association of Manufacturers, the Chamber of Commerce, the
549 Information Technology Industry Council, the Software
550 Information Industry Association, the Alliance of Automobile
551 Manufacturers, and --

552 Chairman Goodlatte. Will the gentleman put the
553 microphone close to him so that the --

554 Mr. Holding. Sorry. The Alliance of Automobile
555 Manufacturers and additional companies which include Adobe,
556 Micron, Microsoft, General Electric, Cree, Corning, Boeing,
557 and a number of others.

558 Separate letters, Mr. Chairman, supporting this effort
559 from the American Intellectual Property and Law Association,
560 the National Alliance for Jobs and Innovation, the Business
561 Software Alliance, the Information Technology and Industry
562 Council and the Intellectual Properties Owners Association.

563 Thank you, Mr. Chairman.

564 [The information follows:]

565

566 Chairman Goodlatte. The chair thanks the gentleman.
567 For what purpose does the gentleman from New York seek
568 recognition?

569 Mr. Nadler. Mr. Chairman, I rise in opposition to the
570 amendment. As the chairman said, it would remove a key
571 component of the legislation. Our goal here has been to
572 craft a provision that will stop thieves planning to flee the
573 country with stolen American property while limiting the
574 possibility of abuse of that provision.

575 The language in the bill in the seizure provision
576 contains a number of safeguards and includes serious
577 penalties including punitive damages for misuse of the
578 seizure provision.

579 As you stated at the trade secret hearing in June, every
580 witness testified to the importance of a seizure provision in
581 trade secret law, albeit one that is narrowly tailored.

582 Again, if someone is planning to flee the country, a
583 court order -- with a trade secret, a court order is not
584 going to do any good. Unlike other forms of intellectual
585 property, once the trade secret is out, the know-how is no
586 longer a competitive advantage, and it is gone.

587 Now, I in general am no fan of seizures or forfeitures.

588 I think they have been abused. I have co-sponsored
589 legislation to narrow them in many other respects, but I
590 think here, with the proper protections, which I think we
591 have put in the bill with the proper limitations, a seizure
592 provision is essential if you are going to protect the trade
593 secrets.

594 We also put in -- not only is it extremely difficult to
595 obtain a seizure order under this bill as it should be, but
596 if a company obtains an order that is wrongful or excessive,
597 the company will owe damages, including punitive damages, and
598 attorney fees.

599 That is a rather unusual, maybe unprecedented provision
600 of law, and should really make sure that the seizures are
601 used only when absolutely necessary. They are absolutely
602 necessary if we are going to stop the theft of trade secrets.

603 The bill has support not only from large companies in
604 all sectors but both small and mid-sized companies
605 represented by the National Alliance for Jobs and Innovation,
606 and by all the other groups Mr. Holding mentioned, I am not
607 going to repeat that.

608 The provision is going to be useful where it is needed,
609 when a thief is getting ready to leave the country with a

610 company's most important know-how to sell it to the highest
611 bidder and put American job creators at a competitive
612 disadvantage.

613 When someone is going to leave the country, which is
614 what we are talking about, we have no choice if we want to
615 stop the trade secret than to have this provision, and
616 therefore, although as I said I do not like seizure
617 provisions in general, I am constrained to oppose the
618 amendment. I yield back.

619 Chairman Goodlatte. Who seeks recognition? For what
620 purpose does the gentleman from Georgia seek recognition?

621 Mr. Collins. Move to strike the last word.

622 Chairman Goodlatte. The gentleman is recognized for
623 five minutes.

624 Mr. Collins. Thank you, Mr. Chairman. I rise also in
625 opposition to this amendment, although I have great respect
626 for the gentlelady from California and the concerns that she
627 has, whether they be on this provision -- I do think this
628 strikes and essentially goes at gutting part of this bill.

629 I would oppose it on those reasons, and this may for
630 some in the room find it is amazing, I also have a lot of
631 commonality although on many things with my friend.

632 I also agree with the gentleman from New York. I have
633 issues with seizures and forfeitures as well, but I do think
634 the provisions here are appropriate and needs to be a part of
635 this.

636 This is an area that is growing not only here but
637 overseas. This is an area in which we are having a lot of
638 issues especially with the understanding that we have here on
639 trade secrets and the understanding that may be in other
640 places.

641 I do appreciate the gentleman from North Carolina's
642 bill. It is good. I will have to oppose this amendment. I
643 appreciate the spirit in which it is brought, but I do
644 believe this amendment will gut the bill and not provide the
645 proper protections that need to be there, and thus, I oppose
646 the amendment, and with that, yield back.

647 Chairman Goodlatte. For what purpose does the gentleman
648 from Georgia seek recognition?

649 Mr. Johnson. Move to strike the last word.

650 Chairman Goodlatte. The gentleman is recognized for
651 five minutes.

652 Mr. Johnson. Mr. Chairman, I am noting here that
653 Federal trade secret law is already governed by the Economic

654 Espionage Act and also by the Computer Fraud and Abuse Act.
655 In addition to those Federal remedies, there are also state
656 remedies.

657 Most states, 47, have already adopted the Uniform Trade
658 Secrets Act, which provides a route for those aggrieved by a
659 trademark violation -- excuse me -- a trade secret violation,
660 they can go to court. They can either go to the Federal
661 courts under diversity jurisdiction or they can sue in state
662 courts.

663 Also, a lawsuit filed in state court or in Federal court
664 would be subject to the plaintiff obtaining a temporary
665 restraining order upon filing the case, which is the same
666 process as an ex parte order as proposed in this new Federal
667 regulation.

668 I am just wondering why is it that we need a new process
669 when the current one seems to be working. If there is
670 someone who can answer that question for me, I would greatly
671 appreciate it as I deliberate on whether or not to oppose or
672 support this amendment. Can anyone help me?

673 Chairman Goodlatte. Does the gentleman from North
674 Carolina want to respond to the gentleman?

675 Mr. Holding. Mr. Chairman?

676 Chairman Goodlatte. The gentleman from Georgia controls
677 the time.

678 Mr. Holding. Will the gentleman yield?

679 Mr. Johnson. I will yield.

680 Mr. Holding. A key section of this bill is
681 establishment of authority for the Federal judge to order a
682 seizure of an allegedly stolen trade secret.

683 Mr. Johnson. Cannot that same thing happen in the
684 context of a temporary restraining order?

685 Mr. Holding. Currently, there is no -- if the gentleman
686 will continue to yield, there is currently no civil cause of
687 action in Federal court.

688 Mr. Johnson. But in state court.

689 Mr. Holding. In state court, of course, state courts
690 are different from state to state.

691 Mr. Johnson. Forty-seven states have adopted the
692 Uniform Trade Secrets Act.

693 Mr. Holding. True. Being able to use a Federal process
694 alleviates the difficulty of having to deal from one state to
695 another.

696 Mr. Johnson. Well, it seems that the biggest addition
697 to all of this is the ex parte order that is provided for in

698 this legislation. I am just wondering why do we need that,
699 what screams out for a remedy like that? What screams out
700 for that remedy?

701 Mr. Holding. Well, you are dealing -- if the gentleman
702 will continue to yield, you are dealing with companies that
703 are across the spectrum, across the United States. You are
704 dealing with supply routes that are across the United States,
705 even international.

706 Having access to Federal court and Federal processes I
707 believe would effectuate the protection of trade secrets
708 better than having to go through the hodge-podge of state
709 courts.

710 Chairman Goodlatte. Will the gentleman yield?

711 Mr. Johnson. I will.

712 Chairman Goodlatte. The gentleman correctly mentioned
713 the Uniform Act. The problem is that if a judge in New York
714 issues a temporary restraining order and the individual who
715 has stolen the trade secret is now in Pennsylvania or
716 California or some place else, it is not going to have
717 applicability.

718 So, we need to have Federal court involvement in this to
719 be able to deal with actions that occur across state lines.

720 Ms. Lofgren. Mr. Chairman?

721 Mr. Johnson. I will yield to the gentlewoman.

722 Ms. Lofgren. I do not think that is accurate, Mr.

723 Chairman. I mean we can argue that we should have a Federal

724 remedy, and perhaps we should have a Federal remedy. I am

725 open to that further discussion.

726 We do have conflict of laws and rules, and I think in

727 the hypothetical posed by the gentleman, we would have rule

728 of law in New Jersey. I thank the gentleman for yielding.

729 Mr. Johnson. Well, as I reclaim my time, I am somewhat

730 baffled still as far as the need for this legislation. With

731 that, I guess if I do not have anyone else, I will just yield

732 back.

733 Chairman Goodlatte. For what purpose does the gentleman

734 from Idaho seek recognition?

735 Mr. Labrador. Mr. Chairman, to strike the last word.

736 Chairman Goodlatte. The gentleman is recognized for

737 five minutes.

738 Mr. Labrador. Thank you, Mr. Chairman. With respect to

739 the amendment, I guess I have a question for the gentleman

740 from North Carolina or for the chairman.

741 I am concerned before we seek a major change in the law,

742 as has been described. We have 47 different states or so
743 that have adopted similar laws, we do not have this provision
744 in any of those state laws, and I have heard today that we
745 held a hearing, and I am not in that subcommittee, so I was
746 not a participant in that subcommittee hearing, but did we
747 ask any start-up's, any of the smaller companies, how this
748 would affect them in competition against larger companies?

749 Did we only have representatives of major industries or
750 did we have some start-up witnesses who could explain how
751 this would affect them if they got into a fight over these
752 trade issues?

753 Chairman Goodlatte. We did not to my knowledge have any
754 start-up's that were on the witness panel, but we do have a
755 number of letters that the gentleman from North Carolina has
756 put into the record for organizations, some of which include
757 representation of smaller companies.

758 I believe that because we have in the narrow language of
759 the seizure provision provisions for punitive damages if a
760 company abuses this, that is a good protection for a small
761 business that cannot afford to deal with this otherwise.

762 Mr. Labrador. Thank you, Mr. Chairman. If I can
763 reclaim my time, just a follow up question. Do we know why

764 none of these states -- I mean this has been established law
765 now in several states, in fact, in the super majority of our
766 states, why have none of these states have actually included
767 a provision like this in their state laws, and why would we
768 seek such a major change at the Federal level?

769 Chairman Goodlatte. Well, my understanding is that the
770 uniform state law, which has been now in effect for many
771 years, there was no provision put in, but there have been
772 efforts to try to do that for many years, but because you
773 have an uniform state law that now 47 states have all
774 followed along behind, it is a good law to the extent that it
775 works, but it does not deal with this problem, and the
776 problem is exacerbated when you have individuals who go
777 across state lines.

778 That is why we need both the Federal involvement and the
779 seizure provisions.

780 Ms. Lofgren. Will the gentleman yield?

781 Mr. Labrador. I will.

782 Ms. Lofgren. I appreciate the questions. One of the
783 start-up's that was in touch with me expressed this concern,
784 you have got engineers going out starting companies all over
785 the world in Silicon Valley. If you have ever worked for

786 another company and you are doing a start-up, you know, the
787 issue could be raised ex parte that it is theft of trade
788 secrets.

789 If you are a start-up and your stuff is seized, you are
790 done. I mean the fact that there is a long term remedy, you
791 could sue, you could get damages, your company is over by the
792 time any of those remedies could ever save you, and that is
793 what the start-up's were expressing to me, and I thank the
794 gentleman for yielding.

795 Mr. Labrador. Thank you. If the gentlewoman would
796 yield to a question, I will reclaim my time and if you will
797 yield to a question. Why are not the provisions of punitive
798 damages in the legislation sufficient to take care of that
799 instance?

800 Ms. Lofgren. What was expressed to me by some of the
801 start-up's was you have a typical start-up where you have a
802 small amount of venture angel funding, a small number of
803 employees, and a product and a hope.

804 If you have an ex parte seizure, if you are a major
805 company, you can fight that. You have resources. You have
806 products. You have statute. If you are a start-up with just
807 that one thing, by the time you actually can get to court, by

808 the time you could pursue those companies, your company is
809 gone.

810 That is the concern that was expressed to me. I cannot
811 say those concerns would be valid in every case, but that is
812 what start-up's were telling me, and it did cause me concern.
813 I thank the gentleman for yielding.

814 Mr. Labrador. I thank the gentlelady. I reclaim my
815 time and I yield my time to the gentleman from --

816 Mr. Holding. Thank you. Just to point out, the
817 National Association of Manufacturers, which represents
818 12,000 small businesses, and the National Alliance for Jobs
819 and Innovation also representing a number of small businesses
820 are in support.

821 In light of the fact that the ex parte seizure provision
822 is a serious undertaking, and it is one of the reasons we put
823 into the bill the number of conditions, which I can list out,
824 but I have run out of time, but if you will take note of the
825 conditions that have to be satisfied in order to use the ex
826 parte and also the protections against the misuse of the
827 seizure provisions, I think you will see that one would be
828 comfortable that they would not be abused because of the high
829 burden, the high standard, and also the ramifications of

830 misuse of the provision.

831 Mr. Labrador. Thank you, Mr. Chairman. I yield back
832 the time that I do not have.

833 Chairman Goodlatte. The chair thanks the gentleman.
834 For what purpose does the gentleman from New York seek
835 recognition?

836 Mr. Jeffries. Mr. Chairman, I move to strike the last
837 word.

838 Chairman Goodlatte. The gentleman is recognized for
839 five minutes.

840 Mr. Jeffries. Mr. Chairman, let me first just thank the
841 distinguished gentlelady from California for raising what I
842 think is an important issue and appropriate discussion. I do
843 have a rising opposition to the amendment and associate
844 myself with comments made by the gentleman from New York and
845 the gentleman from Georgia.

846 I do believe that the underlying provision is narrowly
847 tailored. Of course, in order for a seizure order to be
848 executed, it has to be necessary to preserve evidence,
849 particularly in the face of eminent international flight,
850 which is often the case in these type of trade secret
851 matters.

852 The provision also is directed only at the alleged
853 perpetrator, not third parties. That is another important
854 aspect of how this has been narrowly tailored, and I think
855 third, as has been previously mentioned, the fact that
856 punitive damages would be made available in the event of an
857 abuse of the ex parte seizure provision suggests that there
858 is a strong deterrent to making sure that when this type of
859 remedy is sought, it is being sought in an appropriate
860 fashion.

861 Lastly, I think it is important to note that the
862 ultimate determination as to whether an ex parte seizure will
863 be effectuated will be made by an Article III Federal judge.
864 I think in terms of the custodians of this type of decision,
865 it is appropriate for such judges who have had experience in
866 deliberating about ex parte seizures and other aspects of
867 Federal law.

868 I think when you look at jurisprudence, it seems to me
869 that these Federal judges are often reluctant to act upon an
870 ex parte seizure unless the facts are compelling enough to
871 move forward with this extraordinary remedy.

872 They have experience in this area. There is no reason
873 to believe in this context ex parte seizures will be abused,

874 and that is why I believe that the provision as narrowly
875 tailored in the bill put forth by Representative Holding is
876 appropriate, and I yield back.

877 Chairman Goodlatte. Will the gentleman yield?

878 Mr. Jeffries. Sure.

879 Chairman Goodlatte. I appreciate the gentleman's
880 comments. It is my understanding that either the injunction
881 remedy that is available under the uniform law or an ex parte
882 seizure, first of all, either one of them would have a
883 dramatic impact on a start-up business, so under current law,
884 if you were enjoined, you are in a pretty difficult
885 situation, too.

886 But in either case, you are going to be in court on the
887 adversarial process in a very short period of time once
888 either one of those events takes place.

889 It is not like we are talking about a long period of
890 time. The judge is going to have both parties in and have
891 this resolved very quickly, within a week or so, I would
892 imagine, in most cases.

893 Mr. Jeffries. Well, I think that is correct, that
894 initially you will have the judge as the objective decision
895 maker as to whether the seizure is appropriate. I think

896 Article III Federal judges are in a position to be objective
897 and have experience in this area and other aspects of the
898 law.

899 Then I think the chairman is exactly correct, in a short
900 time thereafter, the adversarial process will commence at
901 which point the other side will have an opportunity to make
902 its case.

903 Ms. Lofgren. Will the gentleman yield?

904 Mr. Jeffries. Certainly.

905 Ms. Lofgren. I think certainly you are both making
906 rational arguments, and I want to acknowledge that. I am
907 mindful that much of the start-up community is well aware of
908 the Da Jazz seizure case, and although that was supposed to
909 be heard within a short period of time, it was postponed
910 repeatedly and secretly in some cases, for well over a year
911 before -- I realize it is not a Web site case.

912 There is grave concern that based on that case and
913 several other seizure cases that a result different than what
914 you have outlined could be the result. I think that is part
915 of the anxiety that has been expressed to me.

916 I thank the gentleman for yielding.

917 Mr. Jeffries. Thank you.

918 Mr. Johnson. And will the gentleman yield?

919 Mr. Jeffries. Certainly.

920 Mr. Johnson. I do not think that this legislation
921 applies only to cases where there is some international
922 aspect of it, so it can be completely a domestic situation
923 between an American large business and an American small
924 business, with the large business going to court for an ex
925 parte hearing.

926 Am I correct on that?

927 Mr. Jeffries. That is correct. I would reiterate the
928 point again that ultimately you have Article III Federal
929 District Court judges who are making the determination. I
930 think there is every reason to believe that those
931 determinations will be objective in the first instance, and
932 they are going to be very reluctant to issue an ex parte
933 seizure order.

934 I think that has been the experience if you will
935 actually scan American jurisprudence.

936 As the distinguished gentlelady from California points
937 out, there are always going to be extreme outliers and there
938 is reason to have anxiety when people focus on the outliers,
939 but if you look at the overall body of jurisprudence in the

940 ex parte seizure area, Federal judges are very reluctant to
941 move forward with this extreme or extraordinary remedy.

942 Chairman Goodlatte. Would the gentleman yield?

943 Mr. Jeffries. Certainly, I will yield to the chairman.

944 Chairman Goodlatte. I thank the gentleman for yielding.

945 Just to say to the gentleman and to the gentlewoman from
946 California, seizures by the Department of Justice, like the
947 instance the gentleman refers to with the Web site, do not
948 have any of the protections that are built into this law,
949 which makes this a much tighter seizure provision.

950 I thank the gentleman for yielding.

951 Mr. Jeffries. I guess my time is expired. I yield
952 back.

953 Chairman Goodlatte. The question occurs on the
954 amendment offered by the gentlewoman from California.

955 All those in favor respond by saying aye.

956 Those opposed, no.

957 In the opinion of the chair, the noes have it. The
958 amendment is not agreed to.

959 Are there further amendments to H.R. 5233?

960 [No response.]

961 Chairman Goodlatte. Being none, the question occurs --

962 a reporting quorum being present, the question is on the
963 motion to report the bill, H.R. 5233, as amended favorably to
964 the House.

965 Those in favor will say aye.

966 Those opposed, no.

967 In the opinion of the chair, the ayes have it, and the
968 bill is ordered reported favorably.

969 Members will have two days to submit views. Without
970 objection, the bill will be reported as a single amendment in
971 the nature of a substitute incorporating all adopted
972 amendments, and staff is authorized to make technical and
973 conforming changes.

974 This concludes our business for today. I thank all the
975 members for attending, and the meeting is adjourned.

976 [Whereupon, at 2:51 p.m., the committee was adjourned.]